In all the circumstances we are of the opinion that this ground of appeal also is without substance.

The appeals are dismissed.

Appeals dismissed.

Solicitors: *Lim Kean Siew & Co.*

MUNIANDY & ORS. v. PUBLIC PROSECUTOR

[F.C. (Barakbah C.J. (Malaya), Pike C.J. (Borneo) and Ong Hock Thye F.J.) February 1, 1966]

[K.L. — Federal Court Criminal Appeal No. X17 of 1965]

Criminal Law and Procedure — Trial — Appeal — Circumstances where Appeal Court can differ from trial judge on questions of fact — Assessment of evidence.

Penal Code, s. 326 — Voluntarily causing grievous hurt — Evidence and fact.

The appellants had been found guilty of voluntarily causing grievous hurt. The learned trial judge accepted the evidence of the prosecution witnesses that there was an unprovoked attack on the complainant by the appellants and rejected that of the defence that there was a general affray. He gave as his ground for so doing that the prosecution witnesses were unshaken in cross-examination.

Held: (1) the fact of being unshaken in cross-examination was not *per se* an all-sufficient acid test of credibility; the inherent probability or improbability of a fact in issue must be the prime consideration;

(2) in view of the fact that the defence story in this case was consistent with the facts of the injuries, while that of the prosecution was not, it was open to the court to differ from the trial judge on the assessment of the evidence and the facts and in the circumstances the convictions of the appellants must be set aside.

Case referred to:—

(1) *Yuill* v. *Yuill* [1945] P. 15, 19.

FEDERAL COURT.

K. Rajanayagam for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: The first appellant was convicted of the offence of voluntarily causing grievous hurt to one Nagarachnam (f) by means of an axe, contrary to section 326 of the Penal Code, and was sentenced to imprisonment for 3 years. He was further charged, together with the second appellant, under sections 109 and 326 of the Penal Code for abetment of another similar offence, committed by the third appellant and upon conviction they each received a sentence of 18 months imprisonment. The third appellant was convicted, under section 326, of voluntarily causing grievous hurt to Ramasamy, husband of Nagarachnam, by means of an iron rod and was sentenced to 6 years imprisonment.

All the appellants were rubber-tappers; the first appellant is a son of the third appellant and the second appellant was their next-door neighbour. None of them had any previous convictions. The two injured persons, the appellants and all the alleged eye-witnesses lived in the labour lines of Jugra Estate. Ramasamy was a commitee member of the workers union. Most of the other eye-witnesses were officers of the union or their relatives and friends.

On August 13, 1964, the day before the events that led to the prosecution, Muniandy (P.W.7), Pandurengan (P.W.10) and Ramasamy (P.W.3) had made a complaint of black magic against the first appellant to Joseph Mamen (D.W.8) the estate contractor who was an independent witness. Muniandy told Mamen that unless he could put an end to such black magic there would be a fight. Three hours later, at 5 p.m., the first appellant with two others complained to Mamen that they had been waylaid and threatened. Mamen's evidence stood uncontradicted.

There were two conflicting versions of what happened at about 8 a.m. the next morning, August 14, 1964. According to all the material prosecution witnesses there was only a wordy quarrel between a female named Thanapakiam and the family of the first and third appellants, which was followed by an unprovoked attack, first, on Nagarachnam by the first appellant with an axe, and then, on Ramasamy with an iron rod. The other version, by the defence, was that there was a general affray involving many more people than were said to have been active participants in the prosecution story of the incident. In fact eight persons were injured, namely, the complainants Nagarachnam and Ramasamy, Pavadai (the third appellant), Letchumi (his wife), Ponnamah, Mariayee, Muniandy (the first appellant), Muniandy s/o Rajoo (P.W.7) and Rajagopal s/o Muniandy (Pavadai). If the prosecution witnesses were telling the unadulterated truth, there was no accounting for the injuries of at least half the number of injured persons. The learned judge, it is true, said:

> "I was satisfied that the third accused was not injured before P.W.2 and P.W.3 (that is Nagarachnam and Ramasamy) had received their injuries. There were indications from the evidence that the fight continued. It was not for me to decide who hit the third accused, but if anybody hit him at all, it must have been P.W.7 who was hardly likely to admit anything that was going to incriminate him. P.W.3, in my opinion, assaulted no one....."

In our view this opinion failed entirely to take into account the evidence given by the defence which explained the injuries of each and every one of the eight persons named. It seems to us, therefore, that the defence story was at least consistent with the facts, whereas that of the prosecution plainly was not. Where there

was *suppressio veri* then *suggestio falsi* was inevitable.

The learned trial judge, in his judgment, went through the evidence of the prosecution witnesses *seriatim* and then said he was satisfied beyond reasonable doubt that a *prima facie* case had been made out. He considered the evidence of Nagarachnam (P.W.2), Ramasamy (P.W.3) and Ganga (P.W.4) absolutely unshaken in cross-examination; he had no reason to doubt the evidence of the two sons of Thanapakiam (P.W.6 & 7) and he had no hesitation in accepting their evidence "in so far as they corroborated the story of P.W.2 (Nagarachnam) in whose evidence he had the utmost faith." He had "no reason to disbelieve the evidence of Ramasamy and the fact remained that he was injured in the eye."

We appreciate that this court should not lightly differ from the views of the trial judge since he had the advantage of seeing and hearing the witnesses whose demeanour he was able to study in order to form his opinion as to their credibility. However, in certain circumstances, it would be right and proper to do so. As was said by Lord Greene M.R. in *Yuill* v. *Yuill*: (1)

"We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not *per se* an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

The learned Deputy Public Prosecutor conceded, rightly and properly in our view, that the head wound of Nagarachnam might as easily have been caused by the sharp edge of the heavy piece of firewood (Ex. P.2) as by the axe (Ex. P.1); he again conceded that it was highly improbable that the iron rod (which was never found) could have been used in the manner demonstrated both by Ramasamy and his only other corroborative witness, Ganga (P.W.9), so as to damage the eyeball of Ramasamy, but, to use the words of the learned trial judge, he would still contend that it was "not impossible".

Of the axe allegedly used against Nagarachnam the judge said:

"From the nature of the injury it was obvious that P.W. 2 was not struck with the sharp edge of the axe because if that had happened, her skull would have been split open. If the head of the axe which is the heavier side, had landed on her head with force, there would have been a depressed fracture. A great deal, of course, would depend upon the force with which the axe landed on her head. Having seen the handle of the axe, I formed the opinion that the handle itself could have caused the two injuries. In any event, I do not think it was impossible for the injuries to have been caused by the axe being thrown at her."

Then, as to the iron rod, the judge said as follows:

"It was brought out under cross-examination that if a person sees anything coming in the direction of his eye, his instinctive reaction would be to close the eye-lid. On that basis it was argued by defence counsel that P.W.3 could not have been poked in the eye with the iron rod without there being injuries on the surrounding area of the eye. The iron rod alleged to have been used was not found. It was stated by the witnesses to be about 4 feet in length and half an inch to three-quarters of an inch in diameter. In my opinion, if a cylindrical object like the iron rod described by witnesses was in the possession of the third accused and P.W.3 was suddenly poked in the eye, it was not impossible for him to have suffered the type of injury which the doctor found on him. A point was made that an object like that would have caused a much more serious injury. That, of course, would depend upon the amount of force used, and the witnesses were certainly in no position to say what amount of force was used. All they could say was that there was a poking movement by the third accused."

At a later stage in the judgment the judge again said:

"I had no evidence as to how heavy the iron rod was and in my opinion it was not impossible for the injury to have been caused by the thrust of a long cylindrical object."

In our opinion the rod must have weighed a few pounds at least. Ramasamy stated it was not a hollow pipe, but solid. He and Munusamy (P.W.4) and Ganga (P.W.9) all gave the same dimensions: it was 4 feet long by about ¾ inch in diameter. Of the force used in the thrust Ramasamy said: "He was holding the rod with both hands placed one behind the other. He poked with all his might." Ganga, too, showed

how it was done; the record reads: "Witness demonstrates holding a stick with one hand behind the other and pushing it forward from in front."

The evidence of both Ramasamy and Ganga was that, while the former was held by the neck and waist by the first and second appellants, his arms were free. Ganga said Ramasamy was struggling in the grip of those two. Ramasamy actually claimed to have seen the rod coming towards his eye. Yet the medical evidence of Dr. Liu (P.W.1) was clear that the rod which merely "lacerated" the cornea — not, be it emphasised, pierced or burst the eye-ball — did not, at the same time, pierce any protecting layer of eyelid. Dr. Liu's evidence as to the probable cause of the injury was as follows:

"The eye injury could have been caused by any flying object. A piece of flying sharp glass could have caused it. If some one aims a blow at the eye, the natural reaction of the victim would be to close the eye. I do not know whether a person could be poked in the eye without the eye lid being injured. If the eye is injured without the eye lid being affected, then the eye was hit when the victim was not expecting to be hit in the eye. If an iron rod ¾" in diameter is thrust into a person's eye, there would be an injury on the surrounding area of the eye. If the iron rod was forcefully pushed into the eye, it would not only injure the eye but enter the brain. If it pierces the brain, it would cause unconsciousness. The eye was bleeding. As far as I can remember, the cornea of the eye was lacerated."

Dr. Abraham (P.W.8) said:

"It does not require much force to take out a person's eye. The eyes can be gouged with fingers."

The effect of a stab in the eye, as described, may well be imagined, as indeed, Dr. Sundram (D.W.4), a surgeon, said in his evidence:

"I have come across injuries to the eye. If an iron rod about 4 feet long with ¾" diameter was used on the eye of a person as he was held by two persons, there would be gross damage to the eyeball with lacerations all round and, depending on the force used, the socket of the eye and the brain. If the injury was a laceration of the cornea, it could have been caused by an instrument such as a fountain pen or with splinters. An injury like that would be more consistent with a splinter.

It is instinctive for a person to close his eyelid if he sees something coming towards his eye. If an iron rod was used, it would have caused severe injury to the eyelid itself. If his hands were free, they would automatically go to the defence of his eye. It would be highly improbable for an iron rod to cause the injury described on the eye of P.W.3."

There was evidence of bottles being thrown during the affray; fragments were found on the scene. Mariayee (D.W.6) was cut by a splinter in this manner: "Kandasamy", she said, "threw a bottle at me. The bottle hit the standpipe. A piece of glass cut my finger. P.W.6 threw 3 or 4 bottles." Dr. Liu certified that Mariayee had a ½" lacerated wound on the proximal phalanx of the right second finger, which was, indeed, strong corroborative evidence, for Ramasamy, according to the defence, was in the thick of the fray. Even if Ramasamy did not use his free hands to cover his eyes when he saw the rod coming towards his face, it was a natural protective instinct for the eyelids to close automatically. Yet the eye stayed open and the free hands made no shield for it.

For the reasons above stated, we are of the opinion that the only reasonable and probable cause of Ramasamy's eye injury was a flying splinter which struck him unawares. We reject as the cause what the trial judge thought "not impossible".

Turning now to the axe, Nagarachnam said that she was standing 10 to 12 feet from the first appellant when the latter threw the axe. Munusamy (P.W.4) claimed that he saw the first appellant throw the axe in the manner he demonstrated and "the bottom sharp edge of the axe hit P.W.2. I saw that with my own eyes." Thanapakiam (P.W.5) saw both the woman and the axe fall on the ground. Kandasamy saw an axe beside Nagarachnam when she fell. He said he picked it up and gave it to his brother Muniandy (P.W.7). Muniandy himself said he saw the axe lying by the side of P.W.2. Kandasamy handed it to him and he gave it to the police. Yet strangely enough, in cross-examination, he said as follows:

"When I saw the first accused throw the axe at P.W.2, I was brushing my teeth at the standpipe. I was standing behind P.W.2, more than a foot away from her, about 3 feet, not directly behind, but at an angle.

When my brother handed me the axe *I asked him where he got it from.....I did not know where my brother had picked it from.*"

Munusamy (P.W.4) gave this elaborate account of the verbal exchange before the axe was thrown:

"The first accused said to P.W.2 'you should not interfere in the matter.... If you interfere, the blow with this axe meant for someone else will fall on your head'."

It stamps him as an unabashed liar.

With respect, we do not agree with the learned trial judge that the smooth round handle of the axe could have caused the lacerated wound on top of Nagarachnam's head. It was of course, not absolutely impossible, but we consider the stick of firewood (Ex. P.2) the more likely weapon which had injured her during the general melee.

We think it inexplicable that she did not instinctively duck or turn aside to dodge the axe she must have seen coming. An underhand throw could not have been used and an overhand throw would give her ample warning of the thrower's intention.

We are far from satisfied with the veracity of all the partisan witnesses; we think the medical evidence of Drs. Liu and Sundram should have been given due weight; we are satisfied that the woman Nagarachman could not have been

injured by the axe in the manner alleged; we are more than satisfied that Ramasamy's eye was never injured by a deliberate act as described.

Accordingly the appeals of all accused are allowed and their convictions are quashed.

Appeals allowed.

A. B. ESTATES LTD. v. COMPTROLLER OF INCOME TAX

[C.J. (Ali J.) February 1, 1966]

[Ipoh — Civil Appeal No. 14 of 1965]

Income Tax — Lease of estate by company to subsidiary company — Whether transaction artificial — Income Tax Ordinance, 1947, ss. 22B and 29.

This was an appeal against the decision of the Board of Review which upheld a tax assessment on the appellant company for the year 1963. The appellant company acquired a rubber estate and leased it to a subsidiary company at the annual rent of $1,200. The Comptroller of Income Tax was of opinion that the rent was unreasonably low and he assessed the appellant company on the profits earned from the estate.

Held: the comptroller had not disputed the fact that the lease was a genuine one and therefore the lease transaction could not be regarded as an artificial transaction within the meaning of section 29 of the Income Tax Ordinance; accordingly the comptroller was not entitled to disregard the transaction and the tax assessment must be annulled.

Cases referred to:—

(1) *Inland Revenue Commisioners* v. *Westminister* [1936] A.C. 1.

(2) *Russell* v. *Inland Revenue Commissioners* [1944] 2 All E.R. 192.

CIVIL APPEAL.

N. T. Rajah for the appellant.

Au Ah Wah (Treasury Solicitor) for the respondent.

Cur. Adv. Vult.

Ali J.: This is an appeal under section 77 of the Income Tax Ordinance No. 48 of 1947 from that part of the decision of the Board of Review whereby tax assessment on the appellant company for the year 1963 was upheld.

The events which led to the present appeal may be stated as follows. The appellant company is a private company carrying on the business of rubber planting in the State of Perak. On the 29th December, 1961, it acquired a rubber estate known as S. R. Estate, which is approximately 132 acres in area, from the executors of the estate of the late G. H. at a price of $190,000. Earlier in the same month the appellant company had bought over the shares of a mining company known as K. P. M., Limited, (hereinafter referred to as "K. P. M.") which thereby became a wholly-owned subsidiary. On the 1st January, 1962, that is, two days after its acquisition by the appellant company, S. R. Estate was leased to K. P. M. at an annual rent of $1,200. The lease was for the initial period of 5 years and contained the usual covenant for the proper upkeep and maintenance of the estate and was duly drawn up, attested and registered in accordance with statutory requirements. Some eight months after the execution of the lease, the comptroller, on becoming aware of the transaction, sought to know the reason why S. R. Estate, which he considered to be a lucrative source of income, had to be leased at such a low rent. There was, in my opinion, nothing unreasonable in this enquiry as the estate was a fairly large one and was earning good profits. But the appellant company appeared to have objected to it, maintaining that it was sufficient for the comptroller's purpose to have regard only to the lease. Subsequent to this, the comptroller decided to exercise his power under section 29(1) of the Income Tax Ordinance to assess the appellant company to tax on the profits earned from S. R. Estate indicating to the effect that he was of the opinion that the lease was an artificial transaction. Although he gave no reasons for this decision, it seems to me clear from his letter that the comptroller was somewhat influenced by at least three factors:—

(1) The profits which could be earned from S. R. Estate.

(2) The rent, which he considered to be abnormally low, and

(3) The fact that the transaction was between a parent company and a wholly-owned subsidiary.

In February, 1964, presumably acting in pursuance of the provision of section 69(1), the comptroller served notice of additional assessment on the appellant company in respect of the profits earned from the estate during the years 1962 and 1963. Disputing the assessment, the appellant company promptly filed notice of objection under section 72(2), which was rejected by the comptroller. Subsequently, the appellant company appealed to the Board of Review on the following grounds:—

"The said chargeable income of $16,146 represents the income of K. P. M. Limited being the income to which K. P. M. Limited was entitled through the use of the land leased from your petitioner under the said memorandum of lease and should therefore have been included in arriving at the statutory income of K. P. M. Limited as required by the provisions of the Income Tax Ordinance.

The said assessments for 1962 and 1963 on your petitioner are made in respect of income that does not belong to your petitioner and are therefore excessive and erroneous in fact and in law. If, which is denied, the Comptroller of Income Tax is entitled to disregard the said memorandum of lease for the purpose of computing the income tax liability of your petitioner, then the Comptroller of Income Tax has erred in applying to your petitioner the commencement provisions of the Ordinance in respect of income more particularly specified in clause 7 thereof."